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Reevaluation of the Dead Man's Statute

Ronald R. Brown
West Virginia University College of Law

STUDENT NOTE

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The law of evidence, as in many other areas of the law, has been greatly influenced by the early English common law. An example of this influence is apparent in the subject of competency of witnesses. The common law in England made certain persons incompetent as witnesses such as those who were parties to a proceeding or had a pecuniary interest in the outcome of a proceeding.[1] However, during the latter part of the nineteenth century, England completely abrogated this exclusionary rule in civil cases.[2] Influenced by this change in England, several state legislatures passed statutes to enlarge the competency of witnesses, however, many jurisdictions retained an exception popularly known as the "dead man's statute".

The typical statute provides, in essence, that no person shall be incompetent as a witness because of his interest in a proceeding or his being a party thereto, but parties and interested persons are incompetent to testify as to any transactions or communications with an insane person or a person since deceased.[3] The explanation proffered by the courts for retaining this exception was that the exception is necessary to prevent one party from having an unfair

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[1] 2 WIGMORE, EVIDENCE § 576 (3d ed. 1940).

[2] MCCORMICK, EVIDENCE § 65 (1954).

[3] The West Virginia statute provides in full, "No person offered as a witness in any civil action, suit or proceeding, shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because he is a party thereto, except as follows: No party to any action, suit or proceeding, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence: Provided, however, that where an action is brought for causing the death of any person by any wrongful act, neglect or default under article seven (§ 55-7-1 et seq.), chapter fifty-five of this Code, the person sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased." W. VA. CODE ch. 57, art. 3 § 1 (Michie 1966); [Hereinafter cited as W. VA. CODE § 57-3-1].

advantage in bringing an action against an administrator for a deceased person or a committee for an insane person. The primary aim of this section of the statute was to remove the strong temptation for false swearing.[4] The West Virginia court taking cognizance of these reasons has declared, "it is the firm public policy of this State, as expressed by that statute, for obvious reasons, that the person who is living shall not be permitted to testify regarding any personal transaction, or communication between him and the deceased person."[5] The court has also noted that "one party shall not be heard if the other is insane enough to be disabled from giving evidence."[6]

Different courts in interpreting "dead man's statutes" have reached conflicting results. Consequently, a decision rendered in one state usually has little persuasive weight in aiding a court in a sister state in interpreting its statute. Even a court's interpretation of a dead man's statute in a single state are often ambiguous and conflicting and this makes it extremely difficult to detemine the exact meaning of the statute. As the American Bar Association's Committee on the Improvement of the Law of Evidence pointed out, "in one State alone, a textbook devotes nearly 400 pages to the interpretation of a 14 line statute."[7] Due to the complexity and harshness of these statutes, they have been subjected to severe criticism and their desirability has been questioned by many outstanding legal writers.[8] Therefore, it is the purpose of this note to present a brief survey of the application, interpretation and administration of the dead man's statute and to examine possible alternatives to the typical prohibitive type of dead man's statute.

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[4] Griswold v. Hart, 205 N.Y. 384, 98 N.E. 918 (1912).

[5] Mullins v. Green, 143 W. Va. 888, 105 S.E.2d 542 (1958); *Cf.* Owens v. Owen's Adm't., 14 W. Va. 88 (1878).

[6] Hinkson v. Ervin, 40 W. Va. 111, 20 S.E. 849 (1894).

[7] 2 WIGMORE, *op. cit. supra* note 1, § 578a.

[8] Dean Wigmore has described the inadequacy of the statute as follows: "As a matter of policy, this survival of the now discarded interest disqualification is deplorable in every respect; for it is based upon a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, *op. cit. supra* note 1, § 578; Professor McCormick had this to say about the statute, "Most commentators agree that here again the expedient of refusing altogether to listen to the survivor is in the words of Bentham, a 'blind and brainless technique'. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other." MCCORMICK, *op. cit. supra* note 2, § 65.

In examining a dead man's statute, it is important to determine what types of action the statute contemplates. The question as to what types of action the statute will be applicable depends upon the particular language of each statute and the court's construction of that language. Since the primary purpose of the statute is to prevent one party from having an unfair advantage in bringing an action against an administrator for a deceased person or a committee for an insane person, it is obvious that it was not intended to be applicable to every type of action.[9]

Several states have statutes which apply in any action involving an executor or administrator as plaintiff or defendant in his representative capacity. The West Virginia statute is applicable whenever a party or interested witness attempts to testify to a party or interested witness attempts to testify to a personal transaction or communication with a deceased or insane person against an executor or administrator of the deceased person or committee of the insane person. Therefore, the statute would be applicable irrespective of whether the executor, administrator or committee would be a plaintiff or a defendant in an action.[10] Statutes in other states, however, apply only when a suit is instituted against the executor or administrator as defendant.[11] The latter type provision may not give an estate protection when the executor or administrator brings an action as contrasted to when he defends one.[12]

West Virginia's statute not only applies to actions involving an insane person and the administrator or executor of a deceased person but extends the protection to "an heir at law, next of kin, assignee, legatee, devisee, or survivor of such person, or the assignee or committee of such insane person."[13] The reason for extending the protection to these particular persons is the possibility of a party having an unfair advantage is just as great against them as it is against an insane person or the administrator or executor of a deceased person. Thus, even though a witness may be interested in the outcome of an action or be a party to an action, his testimony

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[9] For the general law of the states other than West Virginia, the writer has relied mostly upon the scholarly work of Mr. Roy R. Ray on *Dead Man's Statutes*, in 24 OHIO ST. L.J. 89 (1963).

[10] See New House v. England, 118 W. Va. 649, 191 S.E. 525 (1937).

[11] Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

[12] *Ibid.*

[13] W. VA. CODE, § 57-3-1.

will be admissible unless it is offered as evidence against one of the designated persons enumerated in the statute.[14] However, this statement is not completely true, because the court has declared that the word "assignee" also includes the word "grantee".[15]

The dead man's statutes generally are applicable, either expressly or by judicial interpretation to any civil suit or proceeding. The West Virginia court has held that its statute is not limited "to cases arising ex contractu, nor to those in which there may be a judgment for or against the estate of the decedent. . . ."[16] The court stated that this conclusion is in harmony with the construction given to the New York statute. The New York court has held that its statute only applies to civil and not to criminal actions.[17] Therefore, the West Virginia statute, by inference, would not be applicable to criminal proceedings. However, the statute does apply to actions involving negligent injury.[18]

While the West Virginia statute clearly applies in tort, as well as contract actions, its applicability is expressly limited in wrongful death actions.[19] The statute was amended in 1937 to provide, in essence, that when a person is sued in a wrongful death action he shall be competent to testify to any personal transaction or communication with the deceased except that he shall remain incompetent to testify to any conversation he may have had with the deceased.

While the dead man's statutes usually will be applied in the types of action which have been described above, several statutes

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[14] Shuman v. Shuman, 79 W. Va. 445, 91 S.E. 264 (1917); Board of Education v. Harvey, 70 W. Va. 480, 74 S.E. 507 (1912).

[15] William James Sons Co. v. Hutchinson, 73 W. Va. 488, 80 S.E. 768 (1914); Zane v. Fink, 18 W. Va. 693 (1881).

[16] Lawrence v. Hyde, 77 W. Va. 639, 644, 88 S.E. 45 (1916).

[17] RICHARDSON, EVIDENCE § 414 (1955).

[18] See Strode v. Dyer, 115 W. Va. 733, 177 S.E. 878 (1934). This case involves an action for wrongful death, and it seems to be an open question in West Virginia whether or not the statute would be applicable in a negligent injury case when one brings an action against a deceased, to recover for personal injuries, when such deceased person dies from an indepedent cause before suit is brought.

[19] W. VA. CODE, 57-3-1. The limitation reads, "Provided, however, that where an action is brought for causing the death of any person by any wrongful act, neglect or default under article seven . . . . chapter fifty-five of this Code, the person sued, or the servant, agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased."

provide for exceptions where the statute will not be invoked and the person who otherwise would be disqualified will be permitted to testify. West Virginia's statute contains certain exceptions and provides that the disqualification of parties or interested persons shall not extend to any transaction or communication to which any persons protected by the statute could be examined on their own behalf.[20] The court has held that the true construction to be placed on this exception is that when the testimony of one of the designated persons claiming under the deceased is given in evidence, then the adverse party or claimant shall be rendered competent to testify and give his version of the transaction or communication.[21] In an action brought by an administrator to settle his accounts as administrator, the court denied *D's* claim on a promissory note given by deceased because it was given without consideration. The administrator made *D* his own witness and attempted to prove the lack of consideration by *D's* own testimony. The court held that even though *D's* own testimony, as to why the note was given to her, would have been incompetent under the statute, the administrator waived this disqualification by making *D* his own witness.[22] The court in *Coleman v. Wallace,*[23] stated the rule to be "where the executor or other personal representative of an estate testifies against the claim of an interested party, such testimony under the statute serves to open the case for complete inquiry concerning the transactions testified to by such executor or other personal representative." In this case, however, the court ruled that when an administrator simply testifies to the assertion of the adverse party's claim and gives no testimony in support or denial of that claim the door will not be opened in order that the adverse party may testify. The rule stated in the *Coleman* case also applies to distributees of the decedent,[24] and the grantee of the deceased,[25] as well as the other specific persons mentioned in the statute including the deceased. For example, if the deceased

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[20] W. VA. CODE, 57-3-1. The language reads, "But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence . . . ."

[21] Kimmel v. Shroyer, 28 W. Va. 505 (1886).

[22] Ogdin v. Bank, 103 W. Va. 665, 138 S.E. 376 (1927).

[23] 143 W. Va. 669, 104 S.E.2d 349 (1958).

[24] Painter v. Long, 69 W. Va. 765, 72 S.E. 1092 (1911).

[25] Curtis v. Curtis, 85 W. Va. 37, 100 S.E. 856 (1919).

has testified in an action before death, the party or interested witness would also be competent to testify in the action.[26] In all cases, however, when one of these protected persons testify to a particular transaction or communication with the deceased, the door will not be opened to the adverse party to testify to any transaction or communication with the deceased but will be limited to the particular transaction or communication testified to by the protected party.[27]

The court has stated that there is another exception to the dead man's statute which is not expressly found in it. The court in *Crothers' Adm'r. v. Crothers*,[28] stated that the dead man's statute did not render any witness or party incompetent who was competent at common law. At common law a person interested in the outcome of an action was competent to give evidence against his own interest. The court declared that, "Children of a decedent, who are his distributees, are competent witnesses to prove a transfer by their father of personal estate in favor of the transferee."[29] By so testifying, they have testified against their own interest and in favor of the other party.

Once the determination is made as to the types of action to which the statute will be applicable and as to the instances when the statute will not be invoked, the next step is to determine who is disqualified under the dead man's statute. Here again, the statutes vary greatly from jurisdiction to jurisdiction. The different types of statutes that are most commonly found may be divided into three groups: (1) Those statutes that only disqualify "parties"; (2) Those statutes that only disqualify "parties" and "persons" interested in the event of the action; and (3) Those statutes that extend the disqualification to "assignors of" or "persons from or through whom" such parties or interested persons derive their title, interest or claim.[30]

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[26] See Moore v. Moore, 87 W. Va. 9, 104 S.E. 266 (1920).

[27] Janes v. Felton, 99 W. Va. 407, 129 S.E. 482 (1925); Kemmel v. Shroyer, 28 W. Va. 505 (1886).

[28] 40 W. Va. 169, 20 S.E. 927 (1895); *cf.* Speery v. Clark, 123 W. Va. 90, 13 S.E.2d 404 (1941).

[29] Crothers' Adm'r v. Crothers, 40 W. Va. 169, 20 S.E. 927 (1895).

[30] For a list of the states that come under each type of statute, see Ray, *supra* note 10.

New York has a statute which contains the disqualifications set forth in the second and third classifications.[31] Under its terms, if a party to the action is not interested in the outcome of the action, he will not be disqualified. West Virginia's statute contains characteristics similar to those described in the second and third classifications, but it is different from the New York statute in that it disqualifies any party to an action, irrespective of his interest, as well as any person interested in the event thereof. Therefore, in West Virginia, even though a party to an action is not interested in the outcome of the action, he will be disqualified as a witness in respect to any personal transaction or communication between him and the deceased. Both statutes, however, extend a person's incompetency to anyone from whom the incompetent person may have derived his title or interest.[32]

One of the problems the courts have under the statutes which come within the second type of classification is in determining when a witness is interested in the outcome of an action. The West Virginia Court has established a test which states: "By common-law a person is a competent witness in a case if the proceeding cannot be used as evidence for him, though he may be interested in the question in issue, and may entertain wishes on the subject and may even have occasion to test the same question in his own case in a future suit."[33] The court applied this test in *Coleman, Adm'x. v. Wallace.*[34] In this case, the decedent was adjudged insane by the Mental Hygiene Commission of Greenbrier County on June 7, 1949, and her niece cared for her until her death on February 27, 1952. The niece filed a claim for the services rendered, and her claim was rejected by the circuit court. On appeal the supreme court affirmed the lower court's action and held that the niece was an interested party; therefore, she could not testify in support of her claim. In *Tilly v. Ellison,*[35] the court applied a different test to determine what degree of interest will disqualify a witness. The court stated, "To exclude a witness because of interest, under the statute, that interest is tested by common law, and it must be a present, certain and vested

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[31] RICHARDSON, *op. cit. supra* note 17 § 415.
[32] W. VA. CODE, 57-3-1; see RICHARDSON, *op. cit. supra* note 17, § 415.
[33] Crothers' Adm'r. v. Crothers, 40 W. Va. 169, 20 S.E. 927 (1895).
[34] 143 W. Va. 669, 104 S.E.2d 349 (1958).
[35] 107 W. Va. 402, 148 S.E. 380 (1929).

interest; not uncertain, remote or contingent." In this case the court held that the mere fact that the witness was a son-in-law and closely associated in business with the party to the action would not make him an interested person and render him incompetent as a witness under the statute. Therefore, if a witness is not a party to an action, he will not be disqualified as having an interest solely on the basis that he is a close relative of a party to the proceeding.[36]

In West Virginia, a party's incompetency is also imputed to his or her spouse and renders them incompetent to testify as a witness for his or her consort-party or a co-party in the action. This incompetency continues during the joint lives of the two spouses unless the spouse who was a party to the action had been completely eliminated, then the surviving spouse would be competent to testify for a co-party.[37] This rule of imputation of incompetency seems to be based on a presumption of indentity of interest of husband and wife and the common-law rule that they are to be treated as one.

One of the most difficult jobs in administering the dead man's statute is to determine the matters about which parties or interested persons are prohibited to testify. The statute of one state renders a person incompetent to testify as to all matters occuring before the death of the decedent or adjudication of lunacy.[38] However, several of the states have statutes which provide that a party or a person interested in the outcome of an action shall be incompetent to testify as to any transaction with or statement by the decedent.[39]

West Virginia would be classified as having the latter type of statute. The West Virginia statute provides that the party or interested witness shall be incompetent to testify to any "personal transaction or communication" between the party or interested witness and the deceased or insane person. This raises the question what will constitute "personal transactions or communications". The court has ruled, "The words 'personal transactions or communi-

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[36] *In re* Estate of Fox, 131 W. Va. 429, 48 S.E.2d 1 (1948).

[37] See Kuhn v. Shreeve, 141 W. Va. 170, 89 S.E.2d 695 (1955).

[38] Carpenter, *The Dead Man's Statute in Pennsylvania*, 32 TEMP. L.Q. 399 (1959).

[39] Ray, *supra* note 11.

cations' . . . include every method whereby one person may derive impressions or information from the conduct, condition or language of another."[40] The courts of several states, including West Virginia, have taken the position that a motor vehicle accident is a transaction within the meaning of the dead man's statute.[41] Several other acts in West Virginia have been held by the court to constitute a personal transaction or communication, some of which are: the execution of notes,[42] contracts,[43] services performed,[44] payment of rent,[45] the mental and physical condition of an insane person,[46] and an assault.[47] Other courts have held that such acts as marriage and the creation of a partnership shall constitute transactions within the meaning of the dead man's statute.[48] One can readily ascertain from the above examples that the courts have given this section of the statute a broad interpretation, thereby violating its spirit in that it is supposed to be strictly construed.[49]

The courts by giving the words "personal transactions or communications" a broad interpretation have been severely criticized in the administration of the statute because of the harshness of the court's decisions. One area of criticism has been that of automobile collisions. A specific example in West Virginia can be pointed out by the case of *Strode v. Dyer*.[50] In this case, Joanne Strode, as administratix of her husband, recovered from *D* for the wrongful death of deceased as a result of a collision between the deceased's automobile and the one driven by *D*. The trial court limited the testimony of *D* and his wife, who was riding with him, to *D's* actions at the time of the accident but refused to permit them to testify to the actions and movements of the decedent. Judge Maxwell, illustrating the harshness of this result, delivered a strong dissent and stated that the statute should be strictly interpreted. In *Will-*

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[40] Kuhn v. Shreeve, 141 W. Va. 170, 89 S.E.2d 685 (1955).
[41] See Annot., 80 A.L.R.2d 1296 (1961).
[42] Mann v. Peck, 139 W. Va. 487, 80 S.E.2d 518 (1954).
[43] Poling v. Huffman, 48 W. Va. 639, 37 S.E. 526 (1900).
[44] Mann v. Peck, 139 W. Va. 487, 80 S.E.2d 518 (1954).
[45] Martufi v. Daniels, 99 W. Va. 673, 129 S.E. 709 (1925).
[46] Trowbridge v. Stone, 42 W. Va. 45, 26 S.E. 363 (1896).
[47] Clark v. Douglas, 139 W. Va. 691, 81 S.E.2d 112 (1954).
[48] 16 Sw. L.J. 350 (1962).
[49] The West Virginia Court has stated that its statute is to be strictly construed in order that it will not preclude the testimony of any witness that does not clearly come within the letter of the statute. Sayre v. Whetherbolt, 88 W. Va. 542, 107 S.E. 293 (1921).
[50] 115 W. Va. 733, 177 S.E. 878 (1934).

hide v. Biggs,[51] the court followed the same rule established by the *Strode* case, but indicated that the rule is an undesirable one by stating, "The Court is fully aware that the practical results of the rule laid down in the *Strode* case may subject it to serious questions . . . . Any change should be the result of legislative policy and not of judicial innovation."[52] The legislature responded to the court's suggestion by amending the statute in 1937, to provide that a person being sued shall be competent to give evidence in a wrongful death action except that the disqualification still remains as to any conversation with the deceased.[53]

This amendment alleviated the harshness of the *Dyer* and the *Biggs* decisions, but the question arises whether all the inequities were eliminated, or whether there is a need for further change. For this purpose it will be well to examine a hypothetical situation. Suppose *A* and his wife are driving their car north on a country highway. *B*, along with four passengers, is proceeding south on the same highway at an extremely high rate of speed. As *A* approaches a curve, *B* comes around the curve on *A's* side of the road, and as a result a collision occurs in which *B* is killed. As the statute now reads, *A* would be permitted to testify and give evidence as to the actions of *B* in the event that *A* would be sued for *B's* wrongful death. However, *A* does not have the same privileges under the statute if *A* were to sue *B's* personal administrator for *A's* injuries. *A* and his wife would be silenced under the statute while the passengers riding with *B* would be permitted to testify. Further, assume that both *A* and *B* were killed in the collision. If *B's* personal administrator were to sue *A's* estate, *A's* wife would probably be silenced under the statute because she is not being sued for *B's* wrongful death and she would have an interest in the outcome of the action. However, the passengers riding with *B*, would be permitted to testify. Assume that *A's* personal administrator were to sue *B's* estate. Again, *A's* wife would be silenced under the statute, while the passengers riding with *B* would be permitted to testify. Is it just and equitable to render *A* and his wife incompetent as witnesses and permit the passengers who were riding with *B* to testify?

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[51] 118 W. Va. 160, 188 S.E. 876 (1936).
[52] Willhide v. Biggs, 118 W. Va. 160, 166, 188 S.E. 876 (1936).
[53] W. VA. CODE, 57-3-1, *supra* note 19.

Because of the problems that arise from the administration of the dead man's statute when applied to automobile collisions, other states have gone further than West Virginia. For example, in 1940, New York amended its statute to provide that a person shall not be incompetent to testify "as to the facts of an accident or the results therefrom . . . by reason of the operation or ownership of a motor vehicle being operated upon the highways of the state."[54] Kentucky in 1932, amended its statute to permit persons to testify for themselves in actions for personal injuries or for death from negligence or tortious acts.[55]

As a result of the harshness, complexity and the uncertainty in the administration of the prohibitive type of dead man's statutes, such as West Virginia's, several arguments have been propounded against retaining them. Dean Wigmore points out that the present disqualification under the dead man's statutes is subject to the same objections that were used to repeal the "interest rule" nearly a century ago. He classifies these objections as follows: "(1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable . . . ."[56] In 1922, the Legal Research Committee of the Commonwealth Trust Fund of New York appointed a committee of judges, practitioners and professors to explore the feasibility of replacing this prohibitive type of statute. The committee studied a permissive type of statute which permits the interested witness and party to testify by admitting into evidence the declarations and writings of the deceased, to determine if such a liberal statute would be acceptable in place of the prohibitive statutes of the other states. The results of their inquiry were published in 1927.[57] Upon the

[54] RICHARDSON, *op. cit. supra* note 17, § 419. See Rost v. Kessler, 267 App. Div. 686, 49 N.Y.S.2d 97 (1944).

[55] Catlettsburg v. Sulherland's Adm'r., 261 Ky. 535, 88 S.W.2d 19 (1935).

[56] 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940).

[57] A sampling of their findings is as follows: "These more liberal and simpler statutes have the great practical advantage of being easily comprehended and administrated . . . . Whether the provisions need amendment or not, they are decidedly to be desired if they aid in the ascertainment of truth rather than tend to encourage fraud or perjury. Upon the application of this drastic test, all of the judges of the Supreme Courts found them good; only one judge of the Common Pleas Court dissented, while one other was in doubt. Therefore, out of 19 judges of the higher courts, 17, or over 89%, believed that these provisions aid in the ascertainment of truth." THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM, p. 31 (Yale Univ. Press, 1927).

basis of this survey, the committee reached the conclusion that the *prohibitive* type of statute was not necessary to provide protection against false claims, but was an obstruction to the complete ascertainment of the truth. Therefore, the committee recommended the adoption of a *permissive* statute, similar to the one found in Connecticut. In 1937-38, the American Bar Association's Committee on the Improvement of the Law of Evidence, which consisted of an advisory member from each State and Territory and fifteen members at large, reviewed the above recommendation made by the Commonwealth Trust Fund Committee, and voted forty-six in favor of the recommendation and only three opposed.[58]

In view of these arguments and recommendations, the lawyers and others who live in a state that has the prohibitive type of statute may be able to persuade the legislature to make a change. Thus, a brief examination of the different alternatives that may be considered will be in order.

The first alternative would be a complete abrogation of the dead man's statute.[59] Massachusetts and Rhode Island are the only States that do not have a dead man's statute. Futhermore, the American Law Institute's *Model Code of Evidence*[60] and the *Uniform Rules of Evidence* have completely rejected the dead man's rule.[61] On the other hand, most legislatures would probably be hestitant to completely repeal the statutes which have become deeply rooted in the law of most the states. Although the majority of the statutes need to be amended in order to permit an interested witness or party to testify in the proper case, the concept that the estate of the decedent or lunatic needs some protection is still widely advocated.

A second alternative would be to adopt a statute similar to the ones found in New Mexico, Oregon, The District of Columbia and Virginia. These statutes provide for the admission of the testimony

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[58] For a full discussion on the Legal Research Committee of the Trust Fund of New York and the American Bar Association's Committee on the Improvement of the Laws of Evidence, see 2 WIGMORE, EVIDENCE § 578-578a (3d ed. 1940).

[59] For a more complete discussion of these alternatives see Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

[60] MODEL CODE OF EVIDENCE rule 101 (1942).

[61] UNIFORM RULES OF EVIDENCE rule 7 (1953).

of an interested witness or party, but only if the testimony can be corroborated or buttressed by other and disinterested evidence. The courts have disagreed as to what will constitute corroborating evidence. Virginia courts hold that evidence which will confirm and strengthen the testimony of the interested witness will constitute corroborating evidence,[62] however, it does not have to be sufficient to support a judgment.[63] In the District of Columbia, the corroborating evidence will be sufficient if it will lead reasonable men to conclude that the survivor's testimony is probably true.[64] In New Mexico, the requirement for corroboration is that the evidence must be of the type which tends to establish an essential fact necessary to recover.[65] However, in Oregon, the interested person will not be able to recover a judgment unless he establishes a prima facie case without his own testimony.[66]

While this seems to be an improvement over the more conventional statute, it still contains many undesirable features. First, it is still extremely hard for an interested person to prove his claim unless he has a good case without his own testimony. Thus, the statute aids the interested person most when he probably would not need it, because he has the corroborating evidence. In addition, the courts seem to have difficulty in determining what constitutes sufficient corroboration. In view of these undesirable features, a different solution would probably be more desirable.

A third alternative would be to adopt a statute similar to the ones found in Montana and Arizona.[67] While this type of statute contains the familiar prohibitive language it provides that the trail judge may in his discretion admit an interested survivor's testimony when it would clearly be unjust to exclude it.

Even though this statute seems to remedy the harshness of the dead man's statute, it has been criticized as having serious defects.[68] Perhaps the greatest objection is that trial judges would be hesitant

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[62] Varner's Ex'r. v. White, 149 Va. 177, 140 S.E. 128 (1927).
[63] Shenandoah Valley Nat'l. Bank v. Linebury, 179 Va. 734, 20 S.E.2d 541 (1942).
[64] Davis v. Carmody, (Mun. Ct. App. Dist. Col.) 154 A.2d 132 (1959).
[65] Vehn v. Bergman, 57 N.M. 351, 258 P.2d 734 (1953).
[66] Vancil v. Poulson, 236 Or. 314, 388 P.2d 444 (1964).
[67] MONT. REV. CODE § 93-701-3 (1947); ARIZ. REV. STAT. ANN. § 12-2251 (1956); Ray, *supra* note 59.
[68] See Ray, *supra* note 59 at 110.

to exercise their discretion in these cases. Another objection is that the appellate courts might devise the rules for the trial judges to follow and practically diminish their discretion. New Hampshire had a statute similar to the one under discussion, but it proved to be unworkable.[69] The statute was amended to give the judge broader discretion, but again this proved to be unsuccessful;[70] therefore, it was again amended in 1953. Since New Hampshire has found this type statute undesirable, perhaps another alternative would be more workable.

The fourth alternative and what appears to be the most desirable is a statute similar to the one first adopted in Connecticut.[71] Under this statute all interested persons are rendered competent to testify, but a counterpoise is provided as a safeguard by admitting relevant hearsay statements by the decedent. Connecticut has been the pioneer in this approach, and its statute has served as a model for other state statutes. South Dakota adopted a similar statute in 1939.[72] New Hampshire amended its former statute, that had proved unworkable, in order to have a similar statute.[73]

This has probably been the most workable statute. Reports on the desirability of this solution have all been favorable, because it prevents injustice and is capable of easily being interpreted by the courts.

Considering all the cases that have been before the West Virginia Supreme Court of Appeals in connection with the present dead man's statute and the uncertainty as to its real meaning, perhaps, as Professor Dadisman suggested, the time is ripe for the legislature to reappraise the West Virginia's dead man's statute.[74] The adoption of the Connecticut statute or one of similar purport would be a great improvement for the bench and bar.

Ronald R. Brown

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[69] Ray, *supra* note 59 at 110.
[70] N.H. REV. STAT. ANN. § 516.25 (1955).
[71] CONN. GEN. STAT. REV. § 7895 (1949).
[72] S.D. CODE § 36.0104 (1939).
[73] N.H. REV. STAT. ANN. § 516.25 (1955); Ray, *supra* note 59 at 112.
[74] Dadisman, *The West Virginia Dead Man's Statute*, 60 W. VA. L. REV. 239 (1958). Mr. Dadisman is a professor of law at West Virginia University College of Law.